THIRD CIRCUIT

In our brief (Br. 3) we mentioned the Third Circuit only in connection with our first proposition, namely, that the referee's determination of the legal effect of the order of the former referee was not a "finding of fact" but a conclusion of law not binding upon the reviewing court. We did not mention the Third Circuit among those with which the decision of the Sixth Circuit on our second proposition (now under consideration) is in conflict; but from the case cited by the respondents it appears that the Third Circuit might well have been included. Counsel quotes from a paragraph of the decision in *Kuhn* v. *Princess Lida of Thurn & Taxis*, 3 Cir., 119 F. (2d) 704. From the paragraph immediately following counsel's quotation (p. 705) we read

> "The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings" (p. 705) * * * "Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action. * * * An incorrect conclusion by a trial court qualified as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52 (a) specifically provides." *Reversed and remanded.*

From the foregoing it appears that the rule of the Third Circuit also is what we have shown to be the rule of the Second, Fifth, Seventh, Eighth and Ninth Circuits. (Br. 3 and 16).

The other case cited from the Third Circuit, *Anthony P. Miller, Inc.* v. *Needham, et al.*, 122 F. (2d) 710, is not in point. This was an action by a general contractor upon the bond of a sub-contractor. One of the defenses was fraud in obtaining the bond (the other defense being over-

payments). The complaint was dismissed by the trial court. The judgment was *not* affirmed but was *reversed* and remanded by the appellate court. Furthermore, the appellate court said

> "The learned trial judge dismissed the complaint. He refused to make the finding of fraud contended for by the defendant, although he did not find that there was not fraud."

From the foregoing it is clear that the case cited is not in point. The appellate court did not (as did the Sixth Circuit in the case at bar) decline to review the finding of the trial court and sustain the judgment. On the contrary, there was no finding either one way or the other and the judgment was reversed.

FIFTH CIRCUIT

Two cases are cited from this circuit. The first, *Collier v. Union Central Life Ins. Co.*, 100 F. (2d) 411, was a suit to foreclosure mortgage liens. Appellant, defendant in the lower court, pleaded homestead, and sought concellation of the liens. Plaintiff (appellee) denied that the property was homestead, and also pleaded that appellant was estopped to claim that it was. Court made findings of fact.

After reviewing the evidence, the Court says at page 414,

> "Both, then, because by his acts, representations and conduct in securing the loans, appellant is estopped to assert the homestead claim, and because, estoppel aside, he has failed to maintain it, the judgment was right."

Although recognizing the rule that an appellate court is bound by the finding of the trial court, unless clearly

erroneous, the appellate court did not decline to review the evidence, but upon consideration of the evidence found that the finding of the lower court was not clearly erroneous. Such a decision is not in conflict with the rule relied on by us, (Br. 17), that where the evidence is without contradiction the Circuit Court of Appeals, *must* determine the legal effect of facts as presented by the record.

The second case, *Butex Gas Co., et al.*, v. *Southern Steel Co.*, 123 F. (2d) 954, was an appeal from a judgment awarding plaintiff damages and an injunction in a patent infringement action. At page 955, the court says

> "The grant of a patent is presumptive evidence of its validity and the finding of a District Judge as to a fact is entitled to great weight. *But when the full facts as to what constitutes the invention are, as here, undisputed*, it remains at last, for this court, giving due regard to the weight to be given to the grant of the patent and the finding of invention by the District Judge, to examine the record for itself and to determine whether, within the meaning of the statute conferring patent monopoly, there is invention and therefore patent ability." * * * "The patent claims sued on are invalid for want of invention, the judgment is reversed and the cause is remanded with directions to dismiss the bill." [Italics ours.]

Thus, it appears that the court did not accept the findings of the district judge, but examined the undisputed facts for itself and *reversed* the district court. This case is certainly not out of line with the case we cited (Br. 17) from the Fifth Circuit, but even supports our position.

SEVENTH CIRCUIT

The one case cited, *Bradley, et al.*, v. *Smith, Collector of Internal Revenue*, 114 F. (2d) 161, is not in point because it was not a case of accepting a finding based upon

undisputed documentary evidence, etc. The court did review the evidence and it must have been conflicting because the majority held

> "The question presented by this record is whether or not a gift made * * * within two years of the death of the decedent was made in contemplation of death."
>
> "The trial court had evidence before it from which it could reasonably infer that the transfer was not made in contemplation of death."

and the *dissenting* opinion reached the opposite finding

> "My examination of the record impels me to the conclusion that there is no substantial evidence from which any life motive may be inferred; on the contrary, it is clear that the decedent was contemplating death and that he was making the gift as a substitute for a testamentary disposition."

In the case at bar we have no conflicting evidence. There is no dispute as to the existence and exact language of the court order of June 26, 1936. It should be properly construed and given its true legal effect.

Eighth Circuit

From this circuit respondents cite two cases, the first being *United Drug Co.* v. *Obear Nester Glass Co.*, 111 F. (2d) 997. At page 1000 the court says:

> "An examination of the record is convincing that the court did not err in finding infringement. The similarity of appearance of the two marks, of the spelling, of the sound, and the fact that the marks are used on the same kind of merchandise, all justify the inference that purchasers are likely to be deceived by defendant's mark."

It is apparent that this is not a case in which the appellate court accepted a finding of the lower court. There ap-

pears nothing contrary to the correct rule of the Eighth Circuit, which we quoted (Br. 18) as follows:

> "Although the trial court made findings of fact appearing in the record, it was not called upon to pass on the credibility of any witness. There was no conflict in evidence and the appeal *imposes* on this court the duty of ruling upon the questions of law presented." [Italics ours.]

A like comment applies to the second case cited, *McIntosh* v. *Wiggins*, 123 F. (2d) 316. The lower court had found as a fact that there was no fraud, accident or mistake. The appellate court reviews the evidence and the majority opinion states, page 322,

> "We are satisfied that there is no factual basis to support "the claim of fraud, accident or mistake"".

NINTH CIRCUIT

Respondents cite two cases. Before commenting thereon permit us to restate the correct rule of the Ninth Circuit as we quoted it on page 16 of our brief.

> "Inasmuch as there was no conflict in the testimony, the rule invoked by the appellee, that an appellate court will ordinarily accept the findings of the referee approved by the trial judge, is without application."
>
> "Decree reversed."

Against the foregoing counsel cited first *Occidental Life Ins. Co.*, v. *Thomas*, 107 F. (2d) 876. Action by Fay Thomas for double indemnity under life policy. Judgment for plaintiff. Affirmed. At page 878, the court says

> "The trial court's findings are not to be disturbed or appeal unless they are clearly erroneous. Rule 52 (a) * * * We are satisfied that the proof is sufficient to support the finding that the insured is dead."

After reviewing facts the court says, at p. 879,

> "When all the facts are put together, they point with at least fair probability to the insured's having perished in the lake."

Here again we fail to find anything like the acceptance of findings based upon non-conflicting testimony. Nor do we find it in the second case cited,

U. S. v. *Foster,* 123 F. (2d) 32. A claim to recover damages for alleged conversion. Garrecht C. J., at page 34, says

> "The 'statement of facts' in the record is so obscure, uninformative and incomplete as utterly to prohibit a decision by this Court to the effect that the findings were not based upon sufficient substantial evidence. The appellant has failed to bring before us such a record as would compel an overthrow of the findings made below, and the presumption of correctness which attaches to the findings made by a trial court is sufficient to withstand an attack *of the sort here made, upon an obviously incomplete record.*" [Italics ours.]

As to the concluding paragraphs on page 9 we can only repeat from page 15 of our main brief:

> "We are not complaining because the 'demonstration of plain mistake' test applied in the Sixth Circuit in cases of concurrent findings of the referee and court is somewhat more drastic than the test in other Circuits. And we should not object to the Court's statement of its general rule without mentioning the important exception if the case before it were not one falling *within the exception.* But we submit that under the decisions of other circuits (where the exception is recognized) the harsh rule of the Sixth Circuit would not be applied in the instant case because the conclusion or 'finding' of the referee resulted in unnecessary miscarriage of justice, was based upon the construction of the former trustee's order of June 26,

1936, and there was no question of credibility of witnesses nor weight of evidence and the Circuit Court of Appeals was in as good a position as the referee to reach a correct conclusion."

III

On page 10 of respondents' brief counsel repeat the unsupported claim that counsel for petitioners stated orally that they "were relying on an *oral* order of Judge Hough." This we deny. It would seem strange indeed that counsel should state orally that the case rests upon an *oral* order in the face of the record and numerous briefs all showing that petitioners are and have been contending for nothing more than a proper construction of the written court order filed June 26, 1936. Opposing counsel admits (page 10) that in the Transcript of Record there is no reference to such oral order. As we pointed out above, opposing counsel did not see fit to include in the record the transcript of the hearing before the referee which would flatly refute counsel's unsupported claim. Other statements of fact on the same page are unsupported by the record.

Apparently page 10 is intended to offer the contention that the appellate court did fully review the referee's conclusion or "finding." This we anticipated and fully discussed on pages 14 and 15 of our main brief in support of our petition.

We did not ask the court to search the record to determine the existence of an order, oral or written. We asked the court to review the referee's construction of a written order made by a former referee, the existence and language of which order was undisputed, and to determine that

> "The intent and legal effect of the order of the District Court entered June 26, 1936, (R. 8) was to

sell or 'distribute' to petitioner the remaining assets of the bankrupt, including the bankrupt's interest in a certain oil and gas lease known as the Roush lease."

IV

As we have previously stated in III and IV of petitioners' brief, we believe that a discussion of the merits of this case should await the action of this Court on the petition for the writ, and that a statement of petitioners' contention as to the intent and legal effect of the order of June 26, 1936, is sufficient at this time. However, our complete disagreement with the claims of respondents impels us to reply that the problem for the referee in the reopened bankruptcy case was to give full effect to the order actually made by the court some five years prior thereto, and not to review and determine what order, in his opinion, the court *should* have made at that time, as counsel seem to be contending on page 11. No objection was made by any creditor to the disposition of the assets by the bankruptcy court. After a specific portion of the assets were in 1932 ordered transferred to the corporation of creditors, no creditor objected, when the court, in 1936, ordered the remaining assets transferred or distributed to the same creditors instead of being sold to outsiders. The time has long passed for objection, review or appeal as to the bankruptcy court's decision that certain after-acquired property was subject to the lien of the mortgage; and no creditor has to this day ever questioned the correctness of that decision. At the proper time we will submit authority holding that the failure of the involuntary bankrupt to list an asset does not prevent the transfer of title to that asset. But, as we view it, these questions are not before the court at this time.

V

The two authorities cited have no bearing upon the question now before the court, that is, whether a writ of certiorari shall be granted.

Neither do they throw any light on the question we desire to present if the writ be granted, namely, what interest have the Roush heirs (who are entitled to 1/8 of the income from the well as royalty) in taking the ownership of 7/8 of the income away from the persons that invested all the money and drilled the well, especially since the Roush heirs are attempting to take this property not for themselves but for a trustee in bankruptcy to dispose of?

But such question is not now before this court.